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No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the erroneous denial of a peremptory challenge authorized by state law violates a criminal defendant's right to due process and requires reversal of his conviction without any showing that the error affected the outcome of his trial.

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INTEREST OF THE UNITED STATES

This case presents the question whether the erroneous denial of a peremptory challenge authorized by state law violates a criminal defendant's right to due process and requires reversal of his conviction without any showing that the error affected the outcome of his trial. The United States has an interest in that issue because its resolution will affect the treatment of similar issues in federal prosecutions.

STATEMENT

Following a jury trial in Illinois state court, petitioner was convicted of first-degree murder and sentenced to 85 years of imprisonment. J.A. 144. On appeal, he challenged the trial court's disallowance under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), of one of his

peremptory challenges. The Appellate Court of Illinois rejected that claim and affirmed his conviction. J.A. 63-93. The Supreme Court of Illinois remanded for the trial court to supplement the record. J.A. 94-133. After the remand, the Supreme Court of Illinois held that the trial court had erroneously denied petitioner's peremptory challenge but that the error was harmless beyond a reasonable doubt. Accordingly, the court affirmed petitioner's conviction. J.A. 144-176.

1. Petitioner, who is Hispanic, was charged with murdering an African-American man by shooting him in the back of his head in the mistaken belief that he was a rival gang member. J.A. 64, 150. During jury selection, each party was allowed seven peremptory challenges, as provided by Illinois Supreme Court Rule 434(d). Before consideration of juror Deloris Gomez, whose seating on the jury is at issue in this case, petitioner had exercised three peremptory challenges, two against women, one of whom was African-American. J.A. 148, 155. Voir dire of Gomez revealed that she was a business office supervisor at an outpatient orthopedic clinic associated with a hospital that treats many gunshot victims. Gomez stated that she had some contact with patients at the clinic but that her interaction with those patients would not affect her impartiality. J.A. 29-33. Petitioner's counsel then sought to exercise a peremptory challenge against Gomez. J.A. 33.

The judge called counsel to chambers, where he expressed concern that petitioner's strike discriminated against Gomez, "an African-American female." J.A. 34. Petitioner's counsel stated that he was "pulled in two different ways" because he knew Gomez "ha[d] some kind of Hispanic connection given her name" but he was concerned that she saw victims of violent crime on a

daily basis. *Ibid.* The judge disallowed the challenge, explaining that Gomez was the second African-American female that petitioner had struck and that counsel's proffered non-discriminatory explanation was not convincing. J.A. 35-36.

Defense counsel then requested and received permission to question Gomez further, out of the presence of the other jurors. J.A. 36. Gomez reiterated that she worked in a separate building from the hospital emergency room and was certain that her limited contact with gunshot victims would not prevent her from viewing the evidence fairly and following jury instructions and the law. J.A. 37-38. After Gomez left the room, petitioner's counsel renewed his peremptory challenge. He noted that "the jury [was] predominantly women" and that he was "trying to also get some impact from possibly other men in the case." J.A. 39. The trial judge reaffirmed his decision to seat Gomez, stating that he found no "cause" to dismiss her and that he would "override" the peremptory challenge. J.A. 40. After exercising one more peremptory challenge, J.A. 100, petitioner proceeded to trial, and the jury found him guilty of murder. J.A. 144.

2. The Appellate Court of Illinois affirmed petitioner's conviction, with one justice dissenting. J.A. 63-93. The court rejected petitioner's contentions that the trial court lacked authority to raise a *Batson* issue *sua sponte* and erred by requiring petitioner's counsel to justify his challenge in the absence of a prima facie case of discrimination. J.A. 67-78. The appellate court further held that the trial court did not clearly err in finding petitioner's challenge discriminatory, because his counsel's purported concern about Gomez's contact with gunshot victims was undercut by the fact that she

worked in a business office in an entirely separate building from the emergency room, and because petitioner's counsel "admitted that he was striking Gomez because she was a woman." J.A. 79.

3. The Supreme Court of Illinois remanded for further proceedings. J.A. 94-133. It held that a trial court may raise a *Batson* issue *sua sponte* only if a prima facie case of discrimination exists. J.A. 118-123. Finding the record insufficient to determine whether a prima facie case existed when the trial court asked petitioner to justify his challenge, the supreme court remanded for the trial judge "to articulate the bases for his *Batson* rulings." J.A. 132.

4. On remand, the trial judge stated that he had concluded that petitioner's challenge was motivated by gender discrimination. J.A. 136. The judge explained that, before challenging Gomez, petitioner's counsel had challenged two other women. The judge noted that, although counsel sought to justify his strike based on Gomez's exposure to victims of violence, Gomez was employed as a supervisor in a building separate from the hospital, and she had testified that she could be fair and impartial. J.A. 135. Finally, the judge observed that counsel admitted that he had sought to exclude Gomez to "balance" the jury with more men. J.A. 136.

5. After the remand, the Supreme Court of Illinois held that the trial court had erroneously denied petitioner's peremptory challenge because no prima facie case of discrimination existed when the court demanded a justification from counsel. J.A. 147-158. The supreme court concluded, however, that the error did not require reversal of petitioner's conviction. J.A. 158-176. Based on its own precedent and precedent from this Court, the state supreme court held that the error was not struc-

tural, but was subject to harmless-error review. J.A. 158-166. The court observed that "the Constitution does not confer a right to peremptory challenges," J.A. 160 (quoting *Batson*, 476 U.S. at 91); rather, they are just one means to help ensure the selection of an impartial jury, J.A. 159. The court acknowledged that "trial before a biased tribunal *would* deprive a defendant of a substantial right and constitute structural error." J.A. 163-164. But the court explained that "there is no evidence that [petitioner] was tried before a biased jury, or even *one* biased juror," especially since he "does not suggest that Gomez was subject to excusal for cause." J.A. 164. The court also rejected petitioner's contention that the error could not be assessed for harm. Relying on *Neder* v. *United States*, 527 U.S. 1 (1999), and two of its own cases, the court held that it was possible to determine that seating Gomez did not prejudice petitioner. J.A. 164-166. The court reasoned that "the evidence" against petitioner was "so overwhelming that no rational jury—or juror—would have acquitted [petitioner] of the offense." J.A. 166. Consequently, the court concluded, "Gomez's presence on the jury cannot be said to have prejudiced him." *Ibid.* Because the erroneous denial of petitioner's peremptory challenge was "harmless beyond a reasonable doubt," the court found it unnecessary to decide whether the error was "of constitutional dimension." J.A. 171.

SUMMARY OF ARGUMENT

A. The right of state criminal defendants to exercise peremptory challenges is created by state law, not the Constitution. States may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia*

v. *McCollum*, 505 U.S. 42, 57 (1992). The erroneous denial of a state defendant's peremptory challenge thus deprives him of only a state-law right. And whether harmless-error review applies is likewise a question of state law. This Court therefore should not disturb the state supreme court's holding that reversal of petitioner's conviction is not required because the denial of his peremptory challenge was harmless error.

B. The purportedly erroneous denial of petitioner's peremptory challenge did not violate the Due Process Clause. Deprivation of a state-law right constitutes a due process violation only if it "results in prejudice so great as to deny" the defendant the "right to a fair trial." *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986). The erroneous denial of a peremptory challenge does not do so. This Court has repeatedly held that, if no biased juror actually sits, the loss of a peremptory challenge does not impair the right to an impartial jury. *United States* v. *Martinez-Salazar*, 528 U.S. 304, 313 (2000); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988).

Petitioner contends that any proceeding before a tribunal that includes an unlawful participant violates due process. That rule would inappropriately constitutionalize the numerous and often conflicting jury-qualification rules of the different States, even though many of those rules are unrelated to ensuring an impartial jury. In any event, the juror whom petitioner attempted to strike was not an "unlawful" juror: she satisfied the statutory requirements for jury service under Illinois law, and petitioner has never contended that she was excludable for cause.

The purportedly erroneous denial of petitioner's peremptory challenge also did not deny him procedural due process. State rules of criminal procedure do not

create protected liberty interests. And petitioner received ample opportunity to be heard, both before and after the denial of his challenge.

C. Even if the erroneous denial of a peremptory challenge violated due process, the error would not require automatic reversal. Only a handful of fundamental errors require automatic reversal. Those structural errors deprive the defendant of "basic protections" required in every trial, *Rose* v. *Clark*, 478 U.S. 570, 577 (1986), and generally "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993). The erroneous denial of a peremptory challenge, in contrast, deprives the defendant of only a statutory privilege that States may withhold entirely without violating the Constitution. And the error has no effect on the trial record, the legal arguments presented, or the legal standards to be applied by the judge and jury.

An automatic-reversal rule would require unnecessary retrials, could diminish trial courts' vigilance in policing against unconstitutionally discriminatory strikes, and could cause federal and state legislators to reduce or eliminate peremptory challenges. Reversal should not be required when the denial of a defendant's peremptory challenge did not result in the seating of a biased juror. And reversal should certainly not be required where, as here, the evidence was so overwhelming that any rational juror would have found the defendant guilty.

D. Automatic reversal is not required whenever an error affects the composition of the jury. That rule would require costly retrials for numerous technical errors that did not prejudice the defendant, such as a juror's failure to satisfy state age or residency requirements and a judge's mistaken replacement of a juror

with a fully qualified alternate. The automatic-reversal cases cited by petitioner involve unlawful discrimination in jury selection, biased adjudicators, and judges who lacked any statutory authority under federal law to preside over the proceedings—situations very different from the good-faith, erroneous denial of a peremptory challenge.

Automatic reversal is not required whenever it is difficult to assess the effect of an error. This Court has applied harmless-error review to numerous errors whose affects are difficult to assess. The inability to assess harm renders an error structural only if the error denies the defendant a basic protection and infects the entire trial process. The erroneous denial of a peremptory challenge does not have those effects. Moreover, courts can determine that the denial of a peremptory challenge did not affect the outcome of the trial, particularly in cases like this one, where the evidence was so overwhelming that no rational jury could have reached a different result.

ARGUMENT

THE ERRONEOUS DENIAL OF A STATE CRIMINAL DEFENDANT'S PEREMPTORY CHALLENGE DOES NOT INFRINGE HIS CONSTITUTIONAL RIGHTS, AND FEDERAL LAW DOES NOT MANDATE AUTOMATIC REVERSAL OF HIS CONVICTION

The purportedly erroneous denial of petitioner's peremptory challenge violated his rights under Illinois law but did not infringe his rights under the United States Constitution. The appropriate remedy for that state-law violation is a question of Illinois law for the state courts to resolve.

Petitioner attempts to avoid that conclusion by transforming the impairment of his state-created right into a due process violation and by asserting that federal law requires automatic reversal whether or not his constitutional rights were violated. But nothing in the Constitution requires a State to grant peremptory challenges. See *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). And the violation of a state-created right to peremptory challenges, like the violation of most state-law rights, does not violate the Due Process Clause. See *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982). Accordingly, the States are free to develop their own harmless-error tests for violations of that state-created right. See *Cooper* v. *California*, 386 U.S. 58, 62 (1967). This Court should therefore affirm the judgment of the state supreme court holding that any erroneous denial of a peremptory challenge in this case was harmless.

A. Because The Erroneous Denial Of A Peremptory Challenge Deprives A State Defendant Of Only A State-Law Right, The Applicability Of Harmless-Error Review Is A Question Of State Law For The State Courts

This Court has "long recognized" that peremptory challenges "are not of federal constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 311 (2000). Although they "are valuable tools in jury trials," peremptory challenges "are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994) (citation omitted); see, *e.g.*, *Stilson*, 250 U.S. at 586 ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants

in criminal cases."). Indeed, "[t]his Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992).

"Because peremptory challenges are a creature of statute and are not required by the Constitution," the right of a state criminal defendant, such as petitioner, to exercise peremptory challenges derives entirely from state law. *Ross* v. *Oklahoma*, 487 U.S. 81, 89 (1988). The erroneous denial of a peremptory challenge thus deprives him of only a state-law right.

This Court made clear long ago "that a 'mere error of state law' is not a denial of due process" that violates the federal Constitution. *Engle*, 456 U.S. at 121 n.21 (quoting *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948)). "If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'" *Ibid.* (quoting *Gryger*, 334 U.S. at 731) (brackets in original). The Court has repeatedly reaffirmed that principle in numerous cases holding that "federal habeas corpus relief does not lie for errors of state law." *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) (citation omitted); *e.g.*, *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984); *Rose* v. *Hodges*, 423 U.S. 19, 21-22 (1975) (per curiam).

When the deprivation of a defendant's rights under state law does not infringe a specific constitutional guarantee, the error violates the Constitution only if it "results in prejudice so great as to deny" the defendant the "right to a fair trial," *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986), or "so infuse[s] the trial with unfairness as to deny due process of law," *Estelle*, 502 U.S. at 75 (citation omitted). The erroneous denial of a single

peremptory challenge does not meet that test unless it results in the seating of a juror who is actually biased.

This Court made that plain in *Ross*, when it held that a state court's erroneous denial of a for-cause challenge did not violate the defendant's rights to an impartial jury and due process, even though the defendant used one of his peremptory challenges (as required by state law) to remove the juror. 487 U.S. at 87-88, 90-91. Because none of the jurors who actually sat was excludable for cause, the Court "reject[ed] the notion that the loss of [the] peremptory challenge constitute[d] a violation of the constitutional right to an impartial jury." *Id.* at 88. That was true, the Court stressed, even though the error "may have resulted in a jury panel different from that which would otherwise have decided the case." *Id.* at 87.

In *Martinez-Salazar*, the Court extended the holding of *Ross* to a federal defendant who had voluntarily used a peremptory challenge to cure the erroneous denial of a for-cause challenge. 528 U.S. at 307. In doing so, the Court reiterated its earlier conclusion that, if the jury that sits is not biased, the loss of a peremptory challenge does not violate the Constitution. *Id.* at 313.

That conclusion follows from this Court's repeated statements that States control the number of peremptory challenges and may withhold them entirely without violating a defendant's rights to an impartial jury and a fair trial. See, *e.g.*, *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1949). If a State can deny peremptory challenges altogether without violating the Constitution, the erroneous denial of single challenge cannot itself render a trial fundamentally unfair.

That conclusion also follows from the Court's decisions upholding "numerous incursions upon the right to

challenge peremptorily." *Ross*, 487 U.S. at 90 (citation omitted). For example, a defendant may be required to share his peremptory challenges with his co-defendants, even though that requirement reduces the number he may exercise, *Stilson*, *supra*; forces him to use his challenges in a way other than he wishes, see *Ross*, *supra*; or deprives him of a juror he desires, *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827). A defendant may be required to exercise his peremptory challenges simultaneously with the government even if that causes him to waste a challenge on a juror whom the government also challenges. *Pointer* v. *United States*, 151 U.S. 396, 412 (1894). The Court has also approved a practice under which each potential juror, in turn, must be challenged either for cause or peremptorily and, if not excused, sworn before another juror is considered, even though that process limits the defendant's ability to allocate his peremptory challenges among potential jurors. *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894).

The Court has also held that the Constitution prohibits defendants from exercising peremptory challenges based on race, ethnicity, or gender. *J.E.B.*, *supra*; *McCollum*, *supra*; *Hernandez* v. *New York*, 500 U.S. 352 (1991). The purportedly erroneous denial of petitioner's peremptory challenge resulted from the trial court's effort to comply with that constitutional mandate. J.A. 136-137 (finding gender discrimination).[1] Good-

[1] The Supreme Court of Illinois declined to consider the trial judge's finding of gender discrimination because the state supreme court found that no prima facie case of discrimination existed, and thus petitioner should not have been required to explain his strike. J.A. 145-158. But this Court has stated that, once a party has advanced a race-neutral explanation for his challenge, and "the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of

faith errors are an unavoidable consequence of the constitutional prohibition on unlawful discrimination, and they do not render the trial fundamentally unfair.

Because the denial of a state criminal defendant's peremptory challenge deprives him only of state-law rights, whether that error requires automatic reversal, or is instead reviewed for harmlessness, is a question of state law. *Chapman* v. *California*, 386 U.S. 18, 20-21 (1967). And, when "state standards alone have been violated, the State is free, without review by [this Court], to apply its own harmless-error rule to such errors of state law." *Cooper,* 386 U.S. at 62. The trial court's rejection of petitioner's peremptory challenge violated only his state-law rights, so the applicability of harmless-error review was a state-law question for resolution by the state courts.[2] The Supreme Court of Illi-

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whether the [party challenging the strike] had a made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359 (plurality opinion). And, in light of the deferential standard of review that applies to trial court findings of intentional discrimination, *id.* at 364-365, and petitioner's admission that his strike against Gomez was based on "the fact that the jury [was] predominantly women" and that he was "trying to also get some impact from possibly other men," J.A. 39, the trial court's disallowance of the strike as based on "gender," J.A. 137, was fully justified.

[2] The deprivation of petitioner's state-law right resulted from the trial court's purported misapplication of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). But that does not mean that federal law governs the harmless-error analysis of the loss of petitioner's peremptory challenge. *Chapman* makes clear that federal harmless-error standards govern only when the defendant has been deprived of a federal right, which did not occur here. See 386 U.S. at 21 (explaining that the harmless-error standard was a question of federal law because the defendant "suffered * * * a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments" of the federal Constitution, and "[w]hether a conviction for a crime should stand when a State has failed to accord

nois held that reversal of petitioner's conviction was not required, whether or not the denial of his peremptory challenge also violated the Constitution, because the error was harmless beyond a reasonable doubt. J.A. 171. The state court thus implicitly held that state law does not require automatic reversal for the erroneous denial of the challenge. This Court should not revisit that state-law ruling.

B. Petitioner's Arguments That The Erroneous Denial Of His Peremptory Challenge Violated Due Process Are Unpersuasive

Petitioner advances three theories to support his claim that the erroneous denial of his peremptory challenge violated the Due Process Clause. None withstands analysis.

1. Due process is not violated merely because an error in jury selection affected the jury's composition

Petitioner first contends that any proceeding before a tribunal that includes someone who lacks "lawful authority" to participate violates due process and that Gomez was an "unlawful" juror because petitioner had exercised a peremptory challenge against her. Br. 19-20. Petitioner is wrong on both counts.

This Court has never held that a proceeding before a tribunal that includes an unauthorized member necessarily violates due process. None of the three cases that petitioner cites to support that contention rests on constitutional grounds. Two involved judges who participated in appeals of cases in which they had participated at the trial level. The Court held that their participation

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federal constitutionally guaranteed rights is * * * a federal question").

in the appeals violated a federal statute. *William Cramp & Sons Ship & Engine Bldg. Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645, 649-652 (1913); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 387-388 (1893). The third case, *Gomez* v. *United States*, 490 U.S. 858 (1989), held that the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, does not authorize a magistrate judge to preside over voir dire in a felony trial without the parties' consent.

The cases involving unlawfully constituted judicial tribunals that petitioner cites elsewhere in his brief also all rest on statutory grounds. Br. 14 (citing *Nguyen* v. *United States*, 539 U.S. 69 (2003) (non-Article III judge sat on appeal in a criminal case in contravention of statutory requirements); *Wingo* v. *Wedding*, 418 U.S. 461 (1974) (magistrate lacked authority under Federal Magistrates Act to conduct evidentiary hearing in habeas corpus proceeding); *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (retired appellate judge ineligible by statute to participate in en banc proceedings); *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947) (suit to enjoin enforcement of Interstate Commerce Commission order heard by only two judges, in violation of statutory requirement that three judges hear such cases); *Moran* v. *Dillingham*, 174 U.S. 153 (1899) (judge prohibited by statute from sitting on appellate panel because he handled case at trial level).

These cases establish that, when a judge or judicial tribunal in a federal proceeding lacks authority under federal law to preside, the resulting judgment is "unlawful, and perhaps absolutely void," as matter of federal law. *American Constr. Co.*, 148 U.S. at 387. But the cases do not address *due process*, much less establish that due process is violated whenever a tribunal in

a *state* proceeding includes a member who lacks authority to participate under *state* law.

In any event, Gomez did not lack "lawful authority" to serve on petitioner's jury. Petitioner has never suggested that Gomez failed to meet the statutory requirements for juror service under Illinois law or that she was excludable for cause, and the trial judge found that she was qualified to sit. Petitioner cites no Illinois law to support his claim that his strike "voided" Gomez as a juror even though the trial court rejected his challenge. Br. 19. Nor does he identify any Illinois law suggesting that her participation deprived the jury as a whole of its authority to decide his case.

Petitioner's argument thus reduces to a contention that any error in the jury-selection process violates due process if the error affects the composition of the jury. That contention, however, cannot be reconciled with the holding in *Ross* that the erroneous denial of the defendant's for-cause challenge did not result in a constitutional violation even though it "may have resulted in a jury panel different from that which would otherwise have decided the case." 487 U.S. at 87.

Petitioner's proposed rule would inappropriately constitutionalize state jury-selection rules. States impose numerous requirements on eligibility for jury service, many of which are not related to ensuring an impartial jury. See, *e.g.*, Mo. Ann. Stat. § 494.425(1) (West Supp. 2008) (juror must be at least 21 years old); Ala. Code § 12-16-60(a)(1) (2005) (juror must have resided within county for more than 12 months); W. Va. Code § 52-1-8(b)(4) (2008) (juror may not have been reimbursed for serving on a jury within the past two years). Petitioner's proposal would turn violations of all of those state rules into due process matters.

Under petitioner's rule, due process would impose different requirements for jury composition in different parts of the country. Compare 705 Ill. Comp. Stat. 305/2 (West 2007) (juror must be at least 18 years old) with Ala. Code § 12-16-60(a)(1) (2008) (juror must be more than 19 years old) and Mo. Ann. Stat. § 494.425 (West Supp. 2008) (juror must be at least 21 years old); compare also 705 Ill. Comp. Stat. 305/2 (West 2007) (juror must reside in county but no minimum length of residency required) with Wyo. Stat. Ann. § 1-11-101(a)(i) (2007) (juror must have resided in county for 90 days) and Ala. Code § 12-16-60(a)(1) (2005) (juror must have resided in county for more than 12 months). That result cannot be squared with this Court's repeated statements that the requirements of due process "do not depend upon or vary with local legislation." *Bute* v. *Illinois*, 333 U.S. 640, 648 (1948) (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 317 (1926)); cf. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1607 (2008) (state restrictions on arrest do not cause Fourth Amendment protections "to vary from place to place and time to time" (internal quotation marks and citation omitted)).

The constitutionalization of state jury-selection requirements would also unsettle the traditional allocation of authority between the States and the federal government. This Court has repeatedly held that the States lack authority to expand or contract federal constitutional protections. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). But that is precisely what constitutionalizing state limitations on jury service would permit States to do. Constitutionalizing state requirements for jury service would also conflict with the principle that States are generally free to determine the remedies for violations

of their own laws. See *Moore*, 128 S. Ct. at 1606; p. 13, *supra*. Turning violations of state jury-selection rules into due process violations would infringe on that freedom by federalizing harmless-error analysis for violations of the state rules.

2. Seating a juror whom the defendant has peremptorily challenged does not create an unacceptable risk of bias

Petitioner also contends (Br. 26-37) that mistakenly seating a juror against whom the defendant has exercised a lawful peremptory challenge creates an unacceptable risk of bias and thus violates due process. That contention is incorrect.

Accepting petitioner's contention would circumvent the principle that peremptory challenges "may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *McCollum*, 505 U.S. at 57. Based on that principle, the Court, in both *Ross* and *Martinez-Salazar*, "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88; see *Martinez-Salazar*, 528 U.S. at 313.

The erroneous seating of a juror whom the defendant has peremptorily challenged differs from the situations in *Ross* and *Martinez-Salazar* in only two respects, neither of which supports petitioner's argument. First, unlike the situations in *Ross* and *Martinez-Salazar*, the erroneous seating of a struck juror violates state law. But a violation of state law does not establish an impermissible risk of unfairness, as demonstrated by this Court's cases refusing to equate state-law violations with violations of due process. Second, in the struck

juror situation, unlike in *Ross* and *Martinez-Salazar*, the defendant has identified a particular juror whom he wants excluded. But that fact also does not establish a significant risk of bias. The peremptory is an "arbitrary and capricious species of challenge," 4 William Blackstone, *Commentaries* *346, which a defendant "may exercise * * * without reason or for no reason," *Pointer*, 151 U.S. at 408. A defendant may prefer that a particular juror not serve (or may think another juror better) without any justifiable basis for inferring bias.

Petitioner argues that seating Gomez posed a particular danger of bias because the trial court had "required defense counsel to indicate, in front of Ms. Gomez herself, that he had sufficient concerns about her fairness as a juror to exclude her entirely." Br. 28. That argument is also incorrect.

All defense counsel was required to do in front of Gomez was to ask that she be excused. Counsel explained the reasons for his challenge out of her presence and that of the other jurors. If petitioner believed that announcing challenges to prospective jurors in open court threatened the jury's impartiality, he could have objected to that practice at trial. He did not, and the Court should not consider his belated objection now.

In any event, petitioner's argument lacks merit. He asserts (Br. 35-36) that challenging Gomez in her presence created such a danger of biasing her against him that seating her violated due process and requires automatic reversal of his conviction. If that were correct, then a trial court would be required to excuse any juror whom counsel challenged in open court, regardless of the nature or the validity of the challenge. The mere exercise of the challenge would itself create an impermissible risk of future bias. Thus, even when a defen-

dant's peremptory challenge actually violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the court would have to excuse the challenged juror. In fact, even excusing the juror would not prevent reversal because, according to petitioner (Br. 35), witnessing the challenge would have biased the other jurors. Accepting petitioner's argument would therefore require reversal whenever defense counsel has challenged a juror in open court. That cannot be the law.

3. The erroneous denial of petitioner's peremptory challenge did not violate procedural due process

Relying on cases like *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), petitioner also argues (Br. 37-39) that the denial of his peremptory challenge violated due process by depriving him of a protected liberty interest without appropriate procedural safeguards. That argument is mistaken.

a. State law may sometimes create a liberty interest protected by the Due Process Clause. *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005). But state rules of criminal procedure do not ordinarily create protected liberty interests. A criminal defendant has a constitutionally protected liberty interest that the criminal prosecution, as a whole, seeks to overcome by convicting him of a crime. The specific procedural mechanisms that States provide to determine guilt or innocence do not give rise to additional, separate liberty interests. If they did, then little would remain of the rule that violations of state-created trial rights provide no basis for federal habeas corpus relief. See p. 10, *supra*. Thus, petitioner is incorrect (Br. 37) in grounding his asserted liberty interest in expectations created by Illinois peremptory challenge law.

b. When a criminal defendant complains that the violation of a state-created procedural right deprived him of due process, the appropriate inquiry is not the analysis used in civil cases like *Logan*. In *Medina* v. *California*, 505 U.S. 437 (1992), this Court explained that the procedural due process analysis that applies in the civil context "does not provide the appropriate framework for assessing" challenges involving "state procedural rules which * * * are part of the criminal process." *Id*. at 443. The Court noted that "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Ibid*.

Instead, when a defendant claims that a violation of a state criminal procedural rule violates due process, the inquiry is the one traditionally used in the criminal context—whether the violation results in prejudice so great as to deny the defendant his right to a fair trial. *Estelle*, 502 U.S. at 75*; Lane*, 474 U.S. at 446 n.8. As described above, the denial of a state-created right to a peremptory challenge does not result in that kind of unfairness. See pp. 10-13, *supra*.

c. Even assuming that the *Logan* analysis applies to the denial of petitioner's peremptory challenge, the question is whether petitioner had a meaningful opportunity to be heard. *Logan*, 455 U.S. at 433. Here, petitioner received more than adequate procedural protections. He had a full opportunity to be heard before the trial court denied the challenge. As contemplated by *Batson*, the court questioned petitioner's counsel about

the reasons for the challenge. The court gave counsel ample opportunity to justify the strike, requesting an initial explanation and allowing counsel to make further comment after the court announced its tentative decision. The court even permitted counsel to question Gomez further in an effort to support his proffered race-neutral justification. Petitioner also received extensive post-deprivation process. He appealed the denial of the peremptory challenge to the Appellate Court of Illinois and then to the Supreme Court of Illinois, both of which gave careful attention to his claim.

d. The criminal cases that petitioner cites (Br. 37-38) do not support his procedural due process claim. *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), held that the imposition of a sentence by a jury that was not informed of its discretion to impose a lesser punishment deprived the defendant of due process. That error deprived the defendant of any substantive determination of the appropriate punishment for his crime, and the error prejudiced him because of the "substantial" possibility that a properly instructed jury would have imposed a lower sentence. *Id.* at 346-347. Here, in contrast, the denial of petitioner's peremptory challenge did not deprive him of sentencing discretion or any other substantive determination accorded by law. A fair and impartial jury was correctly instructed on its legal options. And, unlike in *Hicks*, where the defendant was prejudiced by the error, in this case, the state supreme court determined that the error did not affect the outcome of petitioner's trial.

Douglas v. *California*, 372 U.S. 353 (1963), and *Evitts* v. *Lucey*, 469 U.S. 387 (1985), likewise do not assist petitioner. *Douglas* held that the "equality demanded by the Fourteenth Amendment" guarantees an indigent criminal defendant the right to counsel when

the State affords defendants an appeal of right. 372 U.S. at 358. Because "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal * * * would be a futile gesture unless it comprehended the right to the effective assistance of counsel," *Evitts* held that due process guarantees the right to effective assistance. 469 U.S. at 397. *Douglas* and *Evitts* thus turned in significant part on the constitutional right to equal protection, which is not implicated here.

C. Even If The Erroneous Denial Of A Peremptory Challenge Violated Due Process, The Error Would Be Subject To Harmless-Error Review

Since *Chapman*, it has been clear that "most constitutional errors can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Harmless-error analysis applies, for example, to improper comments on the defendant's failure to testify (*Chapman*, *supra*), admission of a coerced confession (*Arizona* v. *Fulminante*, 499 U.S. 279 (1991)), and the failure to submit an element of the offense to the jury (*Neder*, *supra*).

The Court has found only a handful of "fundamental" errors that require reversal regardless of their effect on the outcome of the trial. *Neder*, 527 U.S. at 7. It has described those errors as "structural," *Fulminante*, 499 U.S. at 309, explaining that they deprive the defendant of "basic protections," *Clark*, 478 U.S. at 577, and generally "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993). See *Neder*, 527 U.S. at 9

(structural errors "*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence"). Structural errors include denial of counsel of choice (*United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006)); giving a deficient reasonable-doubt instruction (*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993)); racial discrimination in selecting the grand jury (*Vasquez* v. *Hillery,* 474 U.S. 254 (1986)); denial of a public trial (*Waller* v. *Georgia,* 467 U.S. 39 (1984)); denial of self-representation at trial (*McKaskle* v. *Wiggins*, 465 U.S. 168 (1984)); complete denial of counsel (*Gideon* v. *Wainwright*, 372 U.S. 335 (1963)); adjudication by a biased judge (*Tumey* v. *Ohio*, 273 U.S. 510 (1927)); and seating an actually biased juror (*Martinez-Salazar*, 528 U.S. at 316).

The erroneous denial of a single peremptory challenge differs significantly from those structural errors. It does not infringe a "basic protection[]" required in every criminal trial, *Clark*, 478 U.S. at 577, because the Constitution leaves the decision whether to provide peremptory challenges entirely within the State's control. See *Stilson*, 250 U.S. at 586. It also does not render the trial fundamentally unfair or unreliable, because, when no biased juror sits, loss of a peremptory challenge does not deprive the defendant of an impartial jury. *Ross,* 487 U.S. at 88. Nor does the error "infect the entire trial process." *Brecht*, 507 U.S. at 630. It has no effect on the trial record, the legal arguments presented, or the way the case is submitted to the jury. The defendant continues to enjoy counsel, an unbiased jury, and all other protections provided by the Constitution and procedural rules.

Retrials impose significant costs on society, witnesses, and victims. And "[p]assage of time, erosion of

memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle*, 456 U.S. at 127-128. Those costs are an "acceptable and often necessary consequence" when an error "has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

The costs of requiring automatic reversal for erroneous denials of peremptory challenges would be particularly high. Jury selection is often fast-paced and conducted under pressure. A trial judge has complex responsibilities: to ensure that parties have an adequate basis for making challenges, that claims of error (including allegations of discrimination in the use of peremptory challenges) are adjudicated promptly and fairly, and that impartial jurors are empaneled. Experience shows that, despite the diligence of trial judges, jury selection may produce a significant number of errors that, in retrospect, impair or deny defendants' peremptory challenges.

Given that reality, automatic reversal is too high a price to pay to correct an error that, at most, deprives the defendant of the right to exclude a juror whom he believes may be less favorable to him than some other juror. See *United States* v. *Underwoo*d, 130 F.3d 1225, 1230 (7th Cir. 1997) (Easterbrook, J., dissenting from denial of reh'g en banc), cert. denied, 524 U.S. 937 (1998).

An automatic-reversal rule could lead courts to be less vigilant in enforcing *Batson* challenges for fear that good-faith errors will necessitate costly retrials. And it could lead "federal and state legislators to cut down the

number of peremptories—or eliminate them altogether." *United States* v. *Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1995) (en banc) (Kozinski, J., dissenting). This Court should not risk those undesirable results.

Instead, the Court should apply harmless-error analysis to erroneous denials of peremptory challenges. The fundamental purpose of peremptory challenges is to assist in the selection of an impartial jury. *J.E.B.*, 511 U.S. at 137 n.8; *Frazier*, 335 U.S. at 505. The jury that sat in this case was fair and impartial. It unanimously found that petitioner was guilty. It would be pure speculation to conclude that the substitution of a different impartial juror for one of those twelve impartial jurors would have changed the jury's verdict. Thus, because the erroneous denial of petitioner's peremptory challenge did not result in the seating of a biased juror, the error was harmless. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553-556 (1984) (*McDonough*) (Even if a juror's failure to respond correctly to a question on voir dire deprives a party of information that would have led the party to exercise a peremptory challenge, the error does not require reversal unless a correct response "would have provided a valid basis for a challenge for cause.").

A finding of harmlessness is warranted here for an additional reason. As the Supreme Court of Illinois explained, the evidence against petitioner was so overwhelming that no rational jury could have acquitted him. J.A. 171. Gomez's presence on the jury therefore could not have prejudiced petitioner, because any rational juror serving in Gomez's stead would have been required to find him guilty. J.A. 166, 171. Given the overwhelming evidence, the substitution of a different juror could only have affected the outcome if that juror had voted to

acquit despite the overwhelming evidence of guilt. But a criminal defendant has no right to jury nullification, which this Court has repeatedly described as jurors' "assumption of a power which they had no right to exercise." *Standefer* v. *United States*, 447 U.S. 10, 22 (1980) (citation omitted); see *Sparf* v. *United States*, 156 U.S. 51, 102-106 (1895).

C. Petitioner's Arguments For Automatic Reversal Are Unpersuasive

1. Automatic reversal is not required whenever an error affects the composition of the tribunal

Petitioner contends (Br. 13-20) that any error affecting the composition of the tribunal always requires reversal without inquiry into prejudice. That contention is supported by neither precedent nor policy.

None of the cases cited by petitioner adopts the broad rule he espouses. Most of the jury cases involve the unlawful exclusion of jurors based on race or membership in an identifiable group. See *Powers* v. *Ohio*, 499 U.S. 400 (1991) (race); *Batson*, *supra* (race); *Vasquez*, *supra* (race); *Peters* v. *Kiff*, 407 U.S. 493 (1972) (race); *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217 (1946) (daily wage earners). Automatic reversal applies in that context because "discrimination in the selection of jurors harms not only the accused" but also the excluded jurors and the entire community. *Batson*, 476 U.S. at 87. Unlawful discrimination "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law" and impugns "the integrity of the judicial process." *Powers*, 499 U.S. at 411-412 (citation omitted). Similarly, the systematic exclusion of "persons of low economic and social status" suggests that the jury is "the instrument of the economically and socially privi-

leged" and "undermine[s] and weaken[s] the institution of jury trial." *Thiel*, 328 U.S. at 223-224. Those considerations do not apply to an erroneous denial of a peremptory challenge that does not result in the seating of a biased juror.

Another group of petitioner's cases involves juries or presiding judges who were not impartial. See *Gray* v. *Mississippi*, 481 U.S. 648, 667 (1987) (jury "deliberately tipped towards death" by erroneous exclusion of juror who opposed death penalty but could fairly apply law) (citation omitted); *Irvin* v. *Dowd*, 366 U.S. 717 (1961) (two-thirds of jury had decided defendant was guilty before trial); *In re Murchison*, 349 U.S. 133 (1955) (judge presiding over trial had interest in outcome); *Tumey*, *supra* (same). Those cases have no bearing here because petitioner has not shown that any of the jurors was biased.

The final group of cases involves judges or judicial tribunals that lacked statutory authority to preside. See pp. 14-16, *supra*. In a number of such cases, this Court has concluded that, when the presiding judge or judges in a federal proceeding lack statutory authority, the resulting judgment is unlawful under federal law. The Court has required automatic reversal as an exercise of its supervisory authority over the federal courts. *Nguyen*, 539 U.S. at 74, 81. The erroneous denial of the peremptory challenge in this case did not result in an adjudicator who lacked statutory authority to preside under either federal or Illinois law. Nor does this Court have supervisory authority over the Illinois courts. *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982). Accordingly,

the cases cited by petitioner do not support automatic reversal of his conviction.[3]

Indeed, a rule requiring automatic reversal whenever an error affects the composition of the tribunal would conflict with this Court's decisions. It could not be squared with *Ross* and *McDonough,* in which the Court held that errors in the jury-selection process did *not* require reversal even though they may have affected the composition of the jury. See *Ross*, 487 U.S. at 87; *McDonough*, 464 U.S. at 555-556. An automatic-reversal rule also would be inconsistent with *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), which involved a violation of 28 U.S.C. 455(a), a statute providing that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Although this Court affirmed reversal of the judgment under Federal Rule of Civil Procedure 60(b), the Court made clear that "there is surely room for harmless error" when Section 455(a) is violated. *Liljeberg*, 486 U.S. at 862.

Requiring automatic reversal simply because an error affects the composition of the jury would require costly retrials for technical violations of jury-selection rules that did not prejudice the defendant. For example, retrial would be required whenever a juror did not meet

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[3] Contrary to petitioner's contention, *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), does not establish that "errors regarding the choice of an individual to prosecute a crime also require automatic reversal." Br. 15. *Young* involved a judicially appointed prosecutor with a private interest in the case. See 481 U.S. at 813-814 (plurality opinion). *Young* is therefore similar to decisions requiring automatic reversal in cases involving a biased adjudicator, and, like those decisions, has no relevance here.

state qualification requirements, no matter how unrelated those requirements were to ensuring a fair trial. See pp. 16-17, *supra*. Retrial also would be required whenever a judge erroneously dismissed a juror in the mistaken belief that he was disqualified for cause; whenever a judge erroneously replaced a regular juror with a fully qualified alternate; or whenever a judge in good faith miscounted the number of peremptory challenges that a defendant had exercised and thereby deprived the defendant of a challenge. The Constitution does not mandate those results.

2. Automatic reversal is not required whenever it is difficult to assess the effect of an error

Petitioner also argues (Br. 20-26) that automatic reversal is required because it is too difficult to determine whether erroneously seating Gomez affected the outcome of the trial. That argument is incorrect.

This Court has sometimes considered the difficulty in assessing harm in determining whether an error requires automatic reversal. See, *e.g.*, *Gonzalez-Lopez*, *supra*; *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). Difficulty in assessing harm does not, however, in itself render an error structural. The Court has applied harmless-error review to numerous errors whose effects are difficult to assess. In particular, the Court has frequently applied harmless-error review to errors that, like the erroneous denial of a peremptory challenge, do not occur during the presentation of the case to the jury. Thus, the Court has found harmless irregularities in grand jury proceedings, *Mechanik*, *supra*; improper joinder of defendants in a single trial, *Lane*, *supra*; deprivation of a defendant's right to be present at all critical stages of the proceedings, and denial of counsel dur-

ing a communication between the trial judge and a juror, *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam). See also *United States* v. *Olano*, 507 U.S. 725 (1993) (presence of alternates in jury room during deliberations did not violate defendant's substantial rights). The Court has also applied harmless-error review to other errors, such as violation of the right against self-incrimination (*Fulminante*, *supra*) and erroneous exclusion of evidence in violation of the Confrontation Clause (*Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)), even though those errors "affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable." *Neder*, 527 U.S. at 18.

The inability to assess harm renders an error structural only if the error denies the defendant a "basic protection[]," *Clark*, 478 U.S. at 577, and "infect[s] the entire trial process," *Brecht*, 507 U.S. at 630. Thus, the denial of counsel of choice in *Gonzalez-Lopez* infringed a right that the Court described as the "root meaning of the constitutional guarantee" of assistance of counsel. 548 U.S. at 147-148. And the Court stressed that "the deprivation of choice of counsel pervades the entire trial;" it may affect investigation and discovery, plea proceedings, the evidence and argument presented to the jury, and the legal arguments presented to the court. *Id.* at 150. The same is true of joint representation of defendants with conflicting interests, the constitutional violation in *Holloway*. 435 U.S. at 489-490.

In contrast, the erroneous denial of a peremptory challenge deprives the defendant of only a "statutory privilege" that the State may withhold entirely without offending the Constitution. *Frazier*, 335 U.S. at 505 n.11. And, far from infecting the entire trial, the error has no effect on investigation and discovery, plea pro-

ceedings, the development of the trial record, or the legal standards to be applied by the judge and jury.

Contrary to petitioner's contention (Br. 22), if it were necessary to look beyond the fact that no biased juror sat, a court could ascertain that the erroneous denial of a peremptory challenge did not affect the trial's outcome. In this case, the evidence was so overwhelming that no rational jury could have reached a different result. J.A. 166-171; see *Neder*, 527 U.S. at 17-18.

Petitioner incorrectly contends that *Neder*'s overwhelming-evidence analysis cannot be applied when it would require "a wholesale evaluation of the entire record to determine whether a reasonable jury could have acquitted [the defendant]." Br. 25. On the contrary, this Court has repeatedly stated that harmless-error analysis "*mandates* consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1982) (emphasis added); *e.g.*, *Brecht*, 507 U.S. at 638; *Van Arsdall*, 475 U.S. at 681. And the Court has relied on overwhelming evidence to find errors harmless even when they could have affected the jury's determination on multiple (or even all) elements of the offense. See, *e.g.*, *Lane*, 474 U.S. at 450; *Hasting*, 461 U.S. at 512; *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

Finally, petitioner mistakenly argues (Br. 25-26) that applying harmless-error review here is inconsistent with *Sullivan* and amounts to a directed verdict. *Sullivan* involved a defective reasonable-doubt instruction that "vitiate[d] *all* of the jury's findings." 508 U.S. at 281. As a consequence, the defendant did not receive a jury finding beyond a reasonable doubt on *any* element of the offense. The Court therefore concluded that "there

ha[d] been no jury verdict within the meaning of the Sixth Amendment," and that affirming the conviction based on harmless-error review would amount to a directed verdict. *Id.* at 280. In contrast, the error in this case did not vitiate *any* of the jury's findings. Petitioner received a determination on *every* element of the offense from a fair and impartial jury that was properly instructed. He cannot credibly contend that he was denied a jury verdict within the meaning of the Sixth Amendment or that applying harmless-error review would be tantamount to a directed verdict.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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